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PUBLICA UTILITAS PRAEFERETUR PRIVATAE:
ON THE INADEQUACY OF DIVIDING CANON LAW
INTO PUBLIC AND PRIVATE LAW

Abstract: The author undertakes the issue of the dichotomous division of law into public and private in the canonical legal system, which is an issue commonly known to many, including legal theorists. He does not try to distinguish the public and private dimensions in the applicable provisions of the Code of Canon Law, thus following other researchers, but rather demonstrates that the use of the public/private binomial is neither adequate nor sufficient, while describing the community of believers of the Catholic Church, whose differences from the lay communities (especially societies) are the hermeneutic starting point for some relevant conclusions. Moreover, the author supports the legislator's definition of what is "public" and "private" in terms of the faithful functions (*christifedeles*) depending on their respective systemic position.

Keywords: public law; private law; community; society; legal membership.

INTRODUCTION

The transposition of one of the basic divisions of law into public and private is by no means a completely new issue in the upgraded science of canon law following the Second Vatican Council.¹ Some canonists hold the

¹ See J. FORNÉS, *Criteri di distinzione tra pubblico e privato nell'ordinamento canonico*, "Fidelium Iura" (1991), no. 1, pp. 47-67; G. LO CASTRO, *Pubblico e privato nel diritto canonico*,

belief that this division is academically useful, although there is no shortage of canonists who argue their views (often critical) pointing to various difficulties and controversies generated by the reception (often uncritical) of the aforementioned dichotomy, which is proper to the system of law in continental Europe. In doctrine, the dichotomous understanding of law as public and private gained ground essentially on the basis of the theoretical division criteria that were developed and then consolidated by secular legal theorists, who pointed out, on the one hand, the fundamental and, importantly, differentiating object of law or the acting subject, and on the other hand, sought the sense of the division in the embodiment of abstract concepts that were crucial for the system (such as the ideas of freedom and democracy). This polarization of views has often led to the radicalisation of such concepts, on the basis of which true law (*ius verum*) was taken to be only private law or only public law.² Although the discussion in this regard continues,³ its problematisation also (or fundamentally, perhaps) enables us to ask questions anew about the essence and nature of law as such, ignoring the roots of the polemic, which is the functional layer of law perceived as an indispensable component of any human community.

In this study, we do not strive to distinguish between the public and private spheres in the current canonical legal order, but to voice some critical remarks regarding the somehow forced introduction (as I believe) of the distinction in question into the doctrine of canon law, which – both in its essence, in the context of a precisely defined goal, and in terms of the legally specified means to achieve this goal – differs from the system of law within which and for the purpose of which the said distinction was agreed upon.

“Il Diritto Ecclesiastico” (1995), no. 107, pp. 110-139; M. VISIOLI, *Il diritto della Chiesa e le sue tensioni alla luce di un’antropologia teologica*, Roma: Pontificio Istituto Biblico 1999, pp. 89-90; T. GAŁKOWSKI, *Prawo-Obowiązek. Pierwszeństwo i współzależność w porządkach prawnych i społeczności świeckiej*, Warszawa: Wydawnictwo UKSW 2007, pp. 385-398; P. GHERRI, *Introduzione al diritto amministrativo canonico. Fondamenti*, Milano: Giuffrè 2015, pp. 59-61.

² See N. BOBBIO, *La grande dicotomia: pubblico-privato*, [in:] *Stato, governo, società. Per una teoria generale della politica*, ed. N. Bobbio, Torino: CEDAM 1985, p. 15.

³ See J. NOWACKI, *Prawo publiczne – prawo prywatne*, “Prace Naukowe Uniwersytetu Śląskiego w Katowicach” no. 1315, Katowice: Wydawnictwo Uniwersytetu Śląskiego 1992, pp. 5-6; J. ROMUL, *Wstęp do teorii państwa i prawa. Zarys wykładu*, Poznań: Wydawnictwo Terra 1999, pp. 50-51; B. LIŻEWSKI, *Prawo publiczne a prawo prywatne – wybrane uwagi teoretyczne na temat hybrydyzacji instytucji prawnych*, “Zeszyty Naukowe KUL” (2018), no. 61, pp. 48-51.

1. HISTORICAL PERSPECTIVE

In the doctrine of canon law, the division in question re-emerged⁴ in the early twentieth century, when so-called secular Italian canonistics came into being, whose main proponents Pietro Agostino d'Avack and Pio Fedele – in their search for a general theory of canon law – tried to apply to the newly codified law of the Church to the methodological framework of modern civil law dogmatics, thus defining the character of canon law strictly as legal private⁵ and public.⁶ While the work of those eminent Italian scholars merits our recognition, we should note that their doctrine made it possible to highlight the nature of canon law solely by drawing analogy with secular law, thus leaving canon law isolated from other kinds of ecclesiastical science and not strictly in keeping with the practice of the Roman Curia. What is worth underscoring, however, is that their systematisation and determination of what is public and what is private in church law brought to light the outcome of their long debate with each other, which, crucially, used the utility criterion (*utilitas*),⁷ understood as a category differentiating the forenamed domains of law. This thinking of the legal canonical order also echoed the broader context of the changes initiated as far back as the Council of Trent, in the sense that the adoption or rejection of Catholic or Protestant anthropology and (variously understood) theological concepts of the role of the faithful (active or passive) in the process of salvation determined the division in question. While in Catholic scholarship, man's cooperation with divine grace was strongly emphasized, in Lutheran doctrine, in particular, the faithful do

⁴ For a broader historical context of the problem, see P.A. BONNET, "Privato" e "pubblico", [in:] *Das konsoziative Element in der Kirche. Akten des VI Internationalen Kongresses für kanonisches Recht* (München 14-19 September 1987), ed. W. Aymans, K.T. Greinger, St. Ottilien: H. Schmitz, Brill und Schöningh 1989, p. 526.

⁵ P.A. D'AVACK, *Considerazioni sulla questione metodologica nello studio del diritto canonico*, "Il Diritto Ecclesiastico" (1943), no. 54, pp. 126-128; M. NACCI, *Storia del diritto e cultura giuridica. La scienza canonistica del Novecento*, Ariccia: Aracne 2017, pp. 87-97.

⁶ P. FEDELE, *Discorso generale sull'ordinamento canonico*, Padova: CEDAM 1941, p. 108; P. FEDELE, *Lo spirito del diritto canonico*, Padova: CEDAM 1962; R. SOBAŃSKI, *Kryzys czy odrodzenie nauki prawa kanonicznego*, "Prawo Kanoniczne" (1981), no. 24, pp. 25-27.

⁷ Matteo Visioli wrote in his *Il diritto della Chiesa*: "Fin dall'inizio appare evidente che il rapporto si pone a netto vantaggio della dimensione pubblica, assunta secondo il criterio ermeneutico della *utilitas*, e dunque da anteporre al privato. Il diritto medioevale della Chiesa, forte di una influenza rilevante sugli imperatori e sulle strutture inferiori del potere politico, rende omaggio alla *civitas* ponendola in evidenza nel suo aspetto collettivo, e lasciando a un livello consequenziale, dunque secondario, la dimensione privata e i singoli beni dei cittadini" (p. 114).

not benefit from justification before God by their own power, achievements or deeds, but only *sola gratia et per fidem*.⁸

The Evangelical reform, which shook the previously Catholic anthropology, also negated the public character of Christian life. Based on concepts of human rights developed in the Age of Reason, it adhered to deistic and deifying views of man, and made a case for the complete autonomy of the person (also legal autonomy), which was tantamount to absolutizing the private dimension of life (also spiritual life) as well as the interests of the individual.⁹

However, the category of *salus animarum*, adopted by the Italian school as a purely deductive criterion properly qualifying the order of ecclesiastical law and often (over)used by it as a kind of interface (*mutatis mutandis*) between secular law and canon law, has not furnished definitive arguments to resolve the issue. For, on the one hand, identifying the common good with the category of “salvation of souls” may lead to the marginalisation of the faithful in regard of their individual paths of life, charisms as well as their initiative in the realization of their vocations; on the other hand, the prevalence of the spiritual over material good in no way justifies the absolutisation of the believer’s private interest over those goods which we can term “public.”¹⁰

The complexity of the problem at hand is also documented by the efforts made in the 1930s, when the dominant doctrine in the division of canon law into public and private (according to the accepted categories of *ius publicum ecclesiasticum*) was seen in a direct reference to Ulpian’s concept in question, whereby *quod spectat ad statum rei Romanae* applied to public law, while *quod spectat ad singolarum utilitatem* lay in the domain of private law.¹¹ Thus, the utility criterion drew a corresponding boundary for norms that had the characteristics of public law, which directly and overtly regulated the hierarchical organisation of the Church, its offices, the status of ecclesiastical associations and the power of governance exercised in the perfect community as such (especially the legislative power). Conversely, private law was identified with the rights and duties of the faithful as well as the manner of exer-

⁸ Cf. *Wyznanie augsburskie (Konfesja Augsburska) z 1530 r. Część pierwsza*, trans. A. Wantuła, [in:] *Wyznanie augsburskie (Konfesja Augsburska) z 1530 roku. 95 tez ks. Marcina Lutra z 1517 roku*, vol. 1, Bielsko-Biała: Wydawnictwo Augustana 1999, Article 4.

⁹ Cf. M. VISIOLI, *Il diritto della Chiesa*, pp. 118-120.

¹⁰ Cf. T. GAŁKOWSKI, *Prawo-Obowiązek*, pp. 391-392.

¹¹ (D. 1.1.1.2).

cising sacred authority over them.¹² The close link between the two basic components of the system of canon law made it possible to assign to public law the function of *constituens*, while private law was *constitutum*. While the former was usually referred to divine law (eternal and unchanging), the latter type originated in human law (accidental and historically changeable). Also, the detailed division of public law into *ius publicum internum*¹³ and *ius publicum externum* is interesting.¹⁴ The extreme dichotomy of the division (apparently completely theoretical) documents, on the one hand, the systemic compatibility with the paradigm that obtained when the first codification of canon law took place, thus in fact shaping the dominant ecclesiology of the time, and on the other hand, demonstrates the need to revise views and positions in light of the renewed self-consciousness of the Church after Vatican II. The proposed division, overly focused on the external aspects of the ecclesial community,¹⁵ has led to a distortion of the true essence of the Church, which is a milieu for God and man coming together to provide for the osmosis of these two realities, and to an imposed understanding of the said dimensions as “public” or “private”. The extreme dichotomy of the division within the Church understood as *societas inaequalium* led to the virtual legitimisation (or even complete endorsement) of the distinction between public autho-

¹² “Itaque definitur ius publicum canonicum seu ecclesiasticum: systema legum de constitutione et iuribus Ecclesiae tamquam societatis perfectae in finem supernaturalem ordinatae. Ius autem privatum definitur: systema legum, quibus membrorum Ecclesiae iura et officia determinantur, pro ipsorum regime et sanctificatione” – A. PUGLIESE, *Iuris canonici publici et privati summa lineamenta*, vol. 1, Typis Schoae Typographicae Salesianae: Augustae Taurinorum 1936, p. 31. “Publicum et privatum. In iure romano [...] item in Ecclesia: ius publicum spectat directe ad constitutionem, regimen, statum ecclesiasticae societatis et ad subiectum potestatis publicae; illud est proinde ‘quod competit societati perfectae qua tali’; est ius constituens, cum versetur circa potestatem qua pollet Ecclesia condendi leges; agit de iure condendo. Ius privatum vero repicit directe privatos, seu ‘disciplinam et regimen fidelium,’ eorum iura et obligations determinando; unde de iure condito pertractata” – H.I. CICOGNANI, *Ius canonicum primo studi anno in usum auditorium excerpta*, Romae: [n.p.] 1952, p. 48.

¹³ “Earum nempe, Ecclesiam respiciunt ut personam moralem perfectam in se consideratam, cum sua peculiari et intima constitutione et cum iuribus quibus pollet relate ad subditos, praecisione facta a qualibet relatione cum extraneis” – A. PUGLIESE, *Iuris canonici publici et privati summa lineamenta*, p. 32.

¹⁴ “Earum legum, quae Ecclesiae facultates, habitudinem, seu iuridicam positionem, respect non-subditorum et aliarum societatum in statu concordiae, tum in statu conflictus respiciunt” – A. PUGLIESE, *Iuris canonici publici et privati summa lineamenta*, p. 32.

¹⁵ “Ecclesia Christi est vera societas, externa, visibilis, spiritualis et supernaturalis, inaequalis sive hierarchica, necessaria, universalis et unica” – F.M. CAPPELLO, *Summa iuris publici ecclesiastici*, Romae: Apus Aedes Pontificiae Universitatis Gregorianae 1932, p. 109.

rity, exercised in a perfect community (the Church as such), and private authority, exercised in imperfect communities (in religious institutes or associations of the Christian faithful),¹⁶ resulting in numerous cases of abuse of the latter.

2. ALTERNATIVE CONCEPTS OF THE DIVISION

The theories of division already known in doctrine¹⁷ can be complemented by those that do not stem from purely theoretical premises, but those of an institutional-legal nature. A look at its premises shows that the first concept refers to the technical distinction between the concepts of “authority” (*potestas*) and “faculty” (*facultas*) and the semantic values of these terms. In the case at hand, (a) public law could be understood as those hypotheses in which the subject, performing a legal act by virtue of its power of governance, creates at the same time a relationship of subordination with respect to all other subjects of the law; (b) private law, on the other hand, would be defined as those cases in which the believer – exercising his or her entitlement – would oblige only the party to the act (“the counterparty”) to act, ruling out the participation of third parties, whose duty (stemming from the actualisation of that power) would be to refrain from acting. The advantage of adopting the above concept would be a clear configuration of subject-to-

¹⁶ J.L. GUTIÉRREZ, *Potestad dominativa*, [in:] *Diccionario General de Derecho Canónico*, vol. 6, ed. J. Otaduy, A. Viana, J. Sedano, Navarra: Eunsa, 2012, pp. 312-313; T. Rincón-Pérez, *sub c. 596*, [in:] *Comentario exegético al Código de Derecho Canónico*, 2nd ed., vol. 2/2, Pamplona: Eunsa 1997, pp. 1469-1472.

¹⁷ See G. FORCHIELLI, *Il concetto di “pubblico” e “privato” nel diritto canonico*, [in:] *Studi di storia e diritto in onore di C. Calisse*, ed. G. Forchielli, Milano: Giuffrè 1940, pp. 483-556; P. CIPROTTI, *Lezioni di Diritto canonico*, Padova: CEDAM 1943, p. 64ff.; M. PETRONCELLI, *Brevi osservazioni sull’esistenza di una distinzione tra diritto pubblico e privato nell’ordinamento canonico*, “*Il Diritto ecclesiastico*” (1944-1945), no. 55-56, pp. 135-145; A. CRISCITO, *Diritto pubblico e diritto privato nell’ordinamento canonico*, Torino: Giappichelli 1948; R. BIDAGOR, *Consideraciones histórico-jurídicas sobre la distinción del Derecho público y Derecho privado en Derecho Canónico*, “*Miscelánea Comillas*” (1960), no. 34-35, pp. 545-574; J. DE AYALA, *El Derecho Canónico y la idea de interés*, “*Revista española de Derecho Canónico*” (1948), pp. 222-263; J. HERVADA, *El ordenamiento canónico. Aspectos centrales para la construcción del concepto*, Pamplona: Eunsa 1966, p. 274ff.; W. BERTRAMS, *Das Privatrecht der Kirche*, “*Gregorianum*” (1944), no. 25, pp. 283-320; L. DE ECHEVERRÍA, *Características generales del ordenamiento canónico*, [in:] *Investigación y elaboración del Derecho Canónico. Trabajos de la V Semana de Derecho Canónico*, Barcelona: Flors 1956, pp. 55-75.

subject relationships documenting (a₁) the existence of only one entity exercising jurisdiction (*potestate dotatus*), identifying other subjects subordinated to this authority, and (b₁) of the equal participation of subjects in legal transactions, assuming consensual modification of a party's legal status, which stems from the actualisation of the power provided by law. While we should view this proposal quite favourably, we need to, however, be critical of the concretisation of the powers of the faithful, since their precise definition would inevitably involve the issue of so-called basic subjective rights of the faithful with a highly untenable theological basis, as reported by reputable scholars.¹⁸

The second concept covers the issue of institutional-legal consequences resulting from a different understanding of a person's "membership" in and "accession" to a specific human community. It should be underscored that while membership (proper to state populations such as society), implies the existence of a certain territory and is usually not the result of a person's free choice, but only allows for a possible change of residence,¹⁹ joining the community of the Church generally presupposes an act of will (this act is completely voluntary), also enabling the subject to self-determine even with respect to the rite (cf. Canons 111, § 2 and 112, §§ 1-2), the adoption of which necessitates the observance of *ius proprium*. In the state community, as a matter of principle, the legislator protects the subject's rights that he himself has established, which implies that in the vast majority of cases the catalogue of individual rights does not derive from the dignity due to each person, but from a positively established norm. Therefore, the subject's broadly understood personal, political, economic rights and those liberties held before the state apparatus enjoy proper protection.

Another element that differentiates the two different ways of acquiring membership in human societies is the fact that voluntary accession to the ecclesial communion causes the Church to invest the person with proper status and capacity to act, while being incapable of negatively impacting the person. Any activity undertaken against the communion would be self-contradictory, since legal membership that generates *status et habilitates* is granted solely for its own use. Therefore, it is no coincidence that possible "con-

¹⁸ A. CATTANEO, *Fondamenti ecclesiologici del diritto canonico*, Venezia: Marcianum Press 2011, pp. 210-211; P. GHERRI, *Introduzione al diritto amministrativo canonico*, pp. 133-134; P. MICHOWICZ, *Ancora sul concetto di diritto soggettivo nell'ordinamento della Chiesa*, "Annales Canonici" (2021), no. 17, pp. 89-94.

¹⁹ P. CLOSE, *Citizenship, Europe and Change*, London: Palgrave Macmillan 1995, pp. 1-2.

flicts” associated with voluntary accession to ecclesial communion take the form of heresy, apostasy and schism (Canon 751) and are categories that make the canonical legal order radically different from secular law systems, since the specific foundation of the Church community is its communal dimension (*communio*). It is also noteworthy that the ecclesiastical legislator provides for the possibility of withdrawing from the communion of the Church (cf. Canons 171 and 316), while in secular legal systems that permit cases of multiple citizenship (along with the possibility of renouncing any of them), the hypothesis of *apatridia*, i.e., the circumstance in which it would be possible to renounce the only citizenship held by a person, is not considered desirable.²⁰

If the rationale of the above distinction between institutional membership and accession to a particular community is true, we can conclude that, in contrast to organisations of a “natural/spontaneous” character (society),²¹ the Church (communion) can be viewed as an institution established purposefully, with a clearly defined structure and purpose (i.e., the proclamation of the Gospel message), which the faithful – under no circumstances – can alter. As a result, both the rationale and the very purpose of this community turn out to be convergent for both the Church as a whole and each believer. This convergence is usually realized in actions marked by reciprocity and shared responsibility. We can assume, then, that the goal of a community so understood is the conscious and deliberate pursuit of that which is common (“public”), which nevertheless exceeds the intention that is normally attainable for all members individually. In other words, while the logic underlying the operation of society (*societas*) is oriented toward perpetuating the common good (having precedence over the individual and serving to limit claims and conflicts), the logic of the community (*communitas*) is focused on building a common future (secondary to the individual and free from any kind of controversy). However, it is difficult to achieve without every member involving his or her own resources and capabilities to voluntarily make their the broadly defined potential common, while expecting others to reciprocate in the spirit of a greater good. It is indisputable that within a community, every

²⁰ Cf. S. FORLATI, *La cittadinanza nell'ordinamento internazionale. Introduzione ai diritti di cittadinanza*, Venezia: Libreria Editrice Cafoscarina 2011, p. 68; G. KOWALSKI, *Zrzeczenie się obywatelstwa polskiego w kontekście konstytucjonalnego obowiązku solidarności z innymi*, “Roczniki Wydziału Nauk Prawnych i Ekonomicznych KUL” (2006), no. 1, p. 123.

²¹ Cf. A. CAVALLI, *Istituzioni*, [in:] *Enciclopedia delle Scienze sociali*, ed. Istituto della Enciclopedia Italiana Treccani, Roma: Il Mulino 1996, p. 123.

constituent member voluntarily sacrifices part of his or her individuality (*proprium* understood as *haeret ossibus*, not as *suum cuique*) thus giving priority to a common ideal (*fides*), the achievement of which would not be possible/explainable in relationships characterised by a lack of voluntariness. What is essentially at stake is giving precedence to those goods and interests which, under ordinary circumstances, are a necessary and legitimate affirmation of “own” individuality vis-à-vis (*erga*) (a) any other subject capable of operation in socio-legal relations and (b) a social institution, limiting the structure-oriented conditioning of inter-subjective and institutional proneness to conflicts, typical of *societas*.²² This dynamic structurally defines the specific complementarity that exists between the institution and the person, expressed in the possibility (*habilitas vel legitimatio*) that the ecclesiastical legislator grants each subject so that he or she can expect the institution to faithfully preserve its original identity and to act in keeping with the constitutive principles and norms over it has attributed to itself over the centuries in order to maintain and protect the original foundational ideal (cf. Canon 747, §1).²³ In the context thus outlined, it is the individual’s usefulness (*utilitas*) that becomes vital for the attainment of the common good, which is indisputably inherent in the entire community.

It follows from the above that the ecclesiastical legislator does not allow the private nature of the prerequisites directly relating to the share in ecclesial communion of the faithful, i.e. the bonds of the profession of faith, the sacraments and ecclesiastical authority (Canon 205). Moreover, the statutory definition of the right of the faithful (*ius est*) to administer the preaching of the word of God, the sacraments and other means for the sanctification of the faithful (Canon 213), makes it possible to seek such a space in the current legislation, where one could find the traces of regulations of a public character, for – as we have seen – none of the so-called fundamental rights of the faithful belongs to the person as such, but conveys the constitutive elements defining the ecclesial membership of the faithful in the community or manifests the awareness pervading the church legal order of the inherent dignity of every person. In consequence, *ius* – construed as above – cannot be put on a par with interest or private utility, even if only in relation to spiritual reality.

²² Cf. P. GHERRI, *Introduzione al diritto amministrativo canonico*, pp. 84-85; J.I. ARRIETA, *I diritti dei soggetti nell’ordinamento canonico*, “Fidelium Iura” (1991), no. 1, pp. 23-25.

²³ Vatican II, *Constitutio dogmatica Dei Verbum*, AAS 1966, no. 58, p. 822.

It seems, therefore, that for a correct definition of the question of adopting the “public/private” distinction in the science of canon law, it is pivotal to make a socio-anthropological distinction between society and community,²⁴ “obligatory membership” and “voluntary membership”, incorporation and accession, citizenship and the status of a baptised, etc., since the position of the individual in relation to others and the entire legal order is determined by the external or voluntary membership in the community,²⁵ respectively. In other words, the consequence of an *ex officio*, as it were, incorporation into society is the acquisition of *ius ad proprium*, which in the hypothesis of its actualization completely excludes third parties (privacy *par excellence*); as a result of voluntary accession to the community the person partially entrusts herself, its own broadly understood potential, and gives priority to the grace of faith.

3. “PUBLIC” AND “PRIVATE” AS INSUFFICIENT CONCEPTS

Our considerations would be incomplete without a proper understanding of the meaning of the terms ‘public’ and ‘private’ as used by the legislature in certain provisions of the existing Latin Code.²⁶ For clarity, it is worth emphasizing that even a superficial analysis of the laws in question enables the conclusion that the adjective ‘public,’ on most of the hypotheses developed, denotes no more no less than ‘institutional’ or ‘hierarchical,’²⁷ which

²⁴ F. TÖNNIES, *Comunità e società*, Milano: Edizioni di Comunità 1963, p. 45; C. KALITA, *Wspólnota versus społeczeństwo. Spór na temat istoty i funkcji wspólnoty oraz społeczeństwa z perspektywy filozofii społecznej*, Siedlce: Wydawnictwo Naukowe Uniwersytetu Przyrodniczo-Humanistycznego 2018, pp. 319-326.

²⁵ We read in Vatican II’s declaration *Dignitatis Humanae*: “It is one of the major tenets of Catholic doctrine that man’s response to God in faith must be free: no one therefore is to be forced to embrace the Christian faith against his own will [...]. The act of faith is of its very nature a free act. Man, redeemed by Christ the Savior and through Christ Jesus called to be God’s adopted son, cannot give his adherence to God revealing Himself unless, under the drawing of the Father, he offers to God the reasonable and free submission of faith” (Article 10).

²⁶ For example, the institution of public and private associations of the faithful (Canons 312-326); vows and other sacred bonds (Canon 1192); public temporal goods, to which the legislator gives absolute priority over the goods of the individual faithful (e.g., Canon 1257, §§ 1-2).

²⁷ Cf. X. OCHOA, *Index verborum ac locutionum Codicis Iuris Canonici*, Roma: Libreria Editrice Lateranense 1984, pp. 390-391. Taking into account the revision of 8 December 2021 of Book VI of the 1983 Code, the legislator uses the adjective *publicus* as many as 56 times and the adverb *publice* as many as 12 times, of which as many as 30 denote that which is institutional/hierarchical.

implies that being “public” is not tantamount with “ecclesiality,” as some scholarship would have it, especially the followers of secular Italian canonistics (see above).²⁸ However, it cannot be denied that everything that is called *ecclesialis* has a public character! In addition, centrally to our analysis, the adjective *publicus* is often used in legal texts as the opposite of what is “secret” or „notorious,”²⁹ which in turn demonstrates that ‘secret’ and ‘notorious’ are not synonymous with *privatus*. Thus, the linguistic analysis permits the thesis that the ecclesiastical legislator attempts to solve the issue at hand *summa divisio iuris* not relationally (believer vs. community), but conceptually. It does so with the help of its own terminology without aspiring to relative unambiguity of concepts inherent in the science of civil law. In other words, for one thing, the legislator ignores the alleged bipolarity of the division; for another, it applies the terms *publicus* and *privatus* with natural semantic flexibility. However, it is unlikely that the two proposed concepts (technical and conceptual) are mutually exclusive, for in the community of the Church what is “private” is not necessarily opposed to what is “public.” The two categories can help us draw a distinction between the function the legislator assigns to the faithful and the functions proper to hierarchy. It should be noted here that the activities of the faithful, along with those initiated by them, and the ones they take within the Church, need not be the actions of the Church itself as a matter of course.³⁰ This intuition is corroborated by the normative content expressed in Canon 216, where the legislator stipulates that “no undertaking [of the faithful] is to claim the name *Catholic* without the consent of competent ecclesiastical authority,” where what is Catholic (without identifying – either semantically or, much less, functionally, with what is public) does concern the public activity of the Church, which cannot fail to structurally differentiate actions taken *in nomine Ecclesiae* (conceptually public actions) from the private initiatives and intentions of the faithful expressing their fidelity to the Gospel. Even the spiritual (“pri-

²⁸ This is how the term ‘public canon law’ should be understood; cf. R. SOBAŃSKI, *O nową koncepcję kościelnego prawa publicznego wewnętrznego*, “Śląskie Studia Historyczno-Teologiczne” (1970), no. 4, pp. 137-164.

²⁹ See, e.g., Canon 696, §1: “public adherence to ideologies infected by materialism or atheism;” Canon 1368: “who, at a public event or assembly, or in a published writing, or by otherwise using the means of social communication, utters blasphemy;” Canon 1093: “The impediment of public propriety arises from [...] notorious or public concubinage.”

³⁰ Cf. P. GIULIANI, *La distinzione tra le associazioni pubbliche e le associazioni private nel nuovo Codice di Diritto Canonico*, Theses ad Lauream, Roma: Pontificia Università Lateranense 1986, pp. 184-185.

vate”) life of the faithful cannot be regarded as a private interest grounded in a dialectic that opposes the interest of the public.

From the above, it follows that the phenomenological method, properly describing and qualifying the canonical legal order in its historical and dynamic evolution, permits the conclusion that the dichotomy of the division of church law into public and private is merely functional, and therefore does not affect the essence of law as such. It appears that the adjectives/categories analysed here are, in fact, pseudo-concepts for a better systematisation of the phenomenon of law, rather than reliable definitions reflecting the objective scope of the basic division of law as such. The validity of this conviction also follows from the specific notion of canon law as a rule helping the community to live a life of faith (*norma communionis*),³¹ the purpose of which is to sustain and protect the minimum conditions for the continuation over time of the authentic apostolic Church in such a way that the word of God proclaimed today and the sacraments celebrated are the word and the sacraments that Christ the Lord himself instituted.³² In such a perspective, the distinction between what is “public” (*depositum fidei, fides quae*) and what is “private” (*fides qua*) seems not only inappropriate, if not plainly impossible.

The central issue is, therefore, to find new solutions to the issue under analysis, even if it is commonly accepted that the reality of canon law cannot be adequately described by means of the binomial in question, for we must not ignore the differences that exist even with regard to the position³³ of each believer and the nature of the activities of natural and legal persons within the community of the Church.

Perhaps one of the few benefits of addressing the question of the interrelationship between the “public” and the “private” in law as such is the view that law – thought to regulate interpersonal social relations – essentially implies the “public” nature of such a relationship (occurring between at least two subjects), since the essence of law lies in its open nature. In contradistinction to family or friendly (inter-subjective) relationships, law appears as a social phenomenon *par excellence* and cannot be reduced to a purely private sphere. Otherwise, ontologically speaking, law understood as *lex* (not as *ius*), would be self-contradictory, since its essence lies in its open nature with

³¹ Cf. P. GHERRI, *Teologia del diritto canonico. Lezioni introduttive*, Città del Vaticano: Lateran University Press 2004, pp. 302-310.

³² Cf. P. VALDRINI, *Comunità, persone, governo. Lezioni sui Libri I e II del CIC 1983*, Città del Vaticano: Lateran University Press 2013, pp. 183-184.

³³ See Ulpian (D. 1.1.1.2; I. 1.4): “Due sunt positiones: publicum et privatum.”

respect to the space of (a) its cognizability, (b) its preservation/observance, and (c) the means of imposing a penalty when it is infringed. Law conceived as an order of a social nature, in its deepest essence, cannot be private; it is always public.³⁴

CONCLUSION

We posed the crucial question: Is the ecclesiastical legislator truly transposing the division of law into public and private into the regulations currently in force? Even if it we could answer that in the affirmative, however, the most significant fact turns out to be that the separation of what is solely “public” and what is only “private” in the canonical order follows from the uncritical acceptance of notions typical of secular law dogmatics in the area of norms that attempt to express (and describe) the legal reality of the communion of the Church. Despite the inadequacy of the method of division that regulates the relationship between the faithful in the community of the Church (and in relation to it), indicating some proportion in the normative combination of public or private elements in institutions of canon law, permits a cautious conclusion that there are more elements of public law than private law in the current provisions of the Latin Code. In theoretical inquiry, we can, of course, reflect on the dominance of public law over private law and perhaps even making private entitlements of the faithful public (cf. Canon 1400), although this is still a barren path, since determining the content of public law in private law and vice versa does not bring the desired novelty and satisfying solutions to the agreed-upon division.

The ecclesiastical legislator’s terminological approach to the issue at hand basically permits the claim that what is “public” and “private” defines primarily the scope of functions (*munera*) of the faithful according to their proper legal position (cf. Canons 96 and 204, §1), and does not allow, ex-

³⁴ S. Romano wrote: “Il diritto, di ciò che ha di culminante e, quasi, si direbbe, di più essenziale, è principalmente pubblico, mentre il diritto privato è, senza, dubbio, una semplice specificazione del primo, una delle sue forme e direzioni, una sua diramazione. Non soltanto esso è sospeso al diritto pubblico, che ne costituisce la radice e il tronco, ed è necessario alla sua tutela, ma è dal diritto pubblico continuamente, per quanto talvolta silenziosamente, dominato [...]. Gli elementi del concetto del diritto, in genere, debbono desumersi più dal diritto pubblico che dal diritto privato.” S. ROMANO, *L’ordinamento giuridico*, Firenze: Sansoni 1945, pp. 7-8.

haustively, to establish incontrovertible criteria for the division of law in a manner corresponding to solutions used in civil law orders.

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Słowa kluczowe: prawo publiczne; prawo prywatne; wspólnota; społeczeństwo; przynależność prawna.